SC93836

IN THE SUPREME COURT OF MISSOURI

ZACH MCGUIRE, *et al.*,

Respondents,

vs.

KENOMA, LLC, *et al.*,

Appellants.

On Appeal from the 27th Circuit Court of Henry County, Missouri
The Honorable James K. Journey
Case No. 09HE-CC00036

SUBSTITUTE REPLY BRIEF OF APPELLANTS KENOMA, LLC AND SYNERGY, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

REPLY ARGUMENT

Defendants-Appellants Kenoma, LLC and Synergy, LLC (collectively "Synergy") argued in their opening brief that this Court's task is remarkably simple. Specifically, Plaintiffs-Respondents ("Plaintiffs") had the burden to identify a record previously made that would support the correction of the alleged clerical mistake or omission at issue. *Pfeifer v. Pfeifer*, 788 S.W.2d 780, 781 (Mo. Ct. App. 1990). Plaintiffs nowhere challenge the facts or procedure underlying this appeal, and thus have left this Court with the *unrebutted* presumption that the circuit court exceeded its jurisdiction when it amended its May 10, 2011 final judgment. In short, the award of post-judgment interest below was nothing more than "an unauthorized, out-of-time, amendment of the judgment." *Dobson v. Riedel Survey & Eng'g Co.*, 973 S.W.2d 918, 923 (Mo. Ct. App. 1998); *see also Pirtle v. Cook*, 956 S.W.2d 235, 243 (Mo. 1997) ("If the presumption is not rebutted, then any order that changes the record is presumed to change the judgment as well."). The circuit court's award of post-judgment interest must be reversed.

I. This Court has expressly held that Rule 74.06(a) is an "embodiment" of common law rules that "continue to this day."

Without any record to support the correction of a "clerical" mistake, Plaintiffs shoulder the unenviable task of attempting to evade some of the most "firmly established" rules in Missouri law. *See In re Marriage of Rea*, 773 S.W.2d 230, 232 (Mo. Ct. App. 1989). Plaintiffs' core argument concerns an "oversight" they claim to have found in Missouri law. In Plaintiffs' view, the adoption of Rule 74.06(a) silently

nullified volumes of case law, stood the jurisdictional limit of *nunc pro tunc* on its head, and granted circuit courts infinite jurisdiction to correct *judicial* "errors" arising "from oversight or omission." Consistent with their novel view of *nunc pro tunc* jurisdiction, Plaintiffs claim that the *nunc pro tunc* opinions from this Court—described by Plaintiffs as being among the "most outrageous" and "most extreme" decisions for this area of law—are all "outliers" because they applied the common law rather than the text of Rule 74.06(a). *See* Brief of Respondents at 14, 38.

However, Plaintiffs' argument contains its own "omission"—they cite no case even suggesting that Rule 74.06(a) modified or superseded the *nunc pro tunc* powers that have been uniformly defined in countless Missouri cases. In fact, Plaintiffs' five-page attack on *Pirtle* (Brief of Respondents at 21-25) conveniently omits the following holding:

> This common law power to correct the record *continues to this day*. In 1988, Rule 74.06 *embodied this power* by authorizing a court to correct clerical errors.

Pirtle, 956 S.W.2d at 241 (emphasis added); *see also Higher Educ. Assistance Found. v. Hensley*, 841 S.W.2d 660, 662-63 (Mo. 1992) ("That rule codifies the common law order *nunc pro tunc.* In so doing, Rule 74.06 limits itself to clerical mistakes 'arising from oversight or omission.'"). Thus, this Court never intended for Rule 74.06(a) to supersede common law—the rule was adopted as an *approval* of the common law.

For example, one of the first decisions to discuss Rule 74.06(a) appears to be *Hassler v. State*, 789 S.W.2d 132, 133-34 (Mo. Ct. App. 1990). There, the Eastern

District explained that the *rule* "codifies the common law relating to *nunc pro tunc* orders." *Id.* It then applied Rule 74.06(a) so that it was *in harmony* with the common law rules of *nunc pro tunc*: "Clerical errors do not include judicial errors and *the rule* may not be used to enter a judgment different from that judgment actually made even if the judgment made was not the judgment intended." *Id.* (emphasis added).

Later the same year, the Eastern District again applied Rule 74.06(a) consistently with the common law by holding that "a clerical error may be remedied only if there is some writing in the record which evidences the judgment as actually rendered in comparison to the entered judgment." *Roedel v. Roedel*, 788 S.W.2d 788, 790 (Mo. Ct. App. 1990). The Western District issued a similar opinion in 1990, holding: "*That rule* [74.06(a)] allows a court to correct *errors in the record* resulting from oversight or omission and allows the record to reflect judgments actually rendered at a *prior time* but *not faithfully transcribed* in the record." *McFarland v. State*, 796 S.W.2d 674, 676 (Mo. Ct. App. 1990) (emphasis added).

In short, every Missouri case since 1988 has applied Rule 74.06(a) so that it matches the common law rules of *nunc pro tunc*. Although Plaintiffs argue that Rule 74.06(a) is unmoored from the common law, Plaintiffs agree that "courts generally interpret orders entered under this rule as orders *nunc pro tunc*." Brief of Respondents at 18, n.2. Tellingly, when Plaintiffs requested interest below, they did not file a motion for a "Rule 74.06(a) order"—they requested a "*nunc pro tunc* order." *See* LF:100.

II. Based on its plain language, Rule 74.06(a) only permits the correction of "clerical mistakes" or omissions—not judicial mistakes or omission.

As part of their efforts to avoid settled law, Plaintiffs claim the plain language of Rule 74.06(a) permitted the alleged *nunc pro tunc* correction at issue. The rule states, in relevant part:

> (**a**) **Clerical Mistakes - Procedure.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Rule 74.06(a) (bold in original).

In Plaintiffs' view, the language above grants a circuit court two distinct powers: (1) the power to correct "[c]lerical mistakes in judgment orders or other parts of the record"; *and* (2) the apparently unrestricted power to correct "errors … arising from oversight or omission." *See, e.g.,* Brief of Respondents at 18 ("the Rule provides a mechanism to correct omissions in judgments, so long as those omissions result from oversights"). Plaintiffs further argue that the rule applies to both *judicial* and clerical errors. *See* Brief of Respondents at 12 (arguing that the rule permits a court to correct anything "omitted by *judicial* inadvertence"); *id.* at 14 (the rule permits courts to "correct errors arising out of *judicial* oversight.") (emphases added). Plaintiffs' reading of the rule is seriously flawed for a multitude of reasons.

First, Plaintiffs ignore that Rule 74.06(a) is titled "**Clerical Mistakes –**

Procedure." As such, the rule is—*by its own title*—limited to a *clerical* oversight or omission, and *not* a *judicial* oversight or omission. Applying the *rule*, the Western District has expressly held that "'[i]t is improper to use a *nunc pro tunc* order to correct *judicial inadvertence, omission, oversight or error*, or to show what the court might or should have done as distinguished from what it actually did, or to conform to what the court intended to do but did not do.'" *McMilian v. McMilian*, 215 S.W.3d 313, 320 (Mo. Ct. App. 2007) (quoting *Javier v. Javier,* 955 S.W.2d 224, 225–26 (Mo. Ct. App. 1997)) (emphasis added).

Second, there is a sharp distinction between a clerical error and a judicial error. While Synergy agrees that judges, like clerks, can make *clerical* errors that are correctible under the powers of *nunc pro tunc*, a clerical error is merely "a mistake in writing or copying." *Hensley*, 841 S.W.2d at 662. Indeed, this Court has expressly held that a *nunc pro tunc* order is a mechanism that is "only available to correct clerical errors, not judicial errors." *Brooks v. Brooks*, 98 S.W.3d 530, 532 (Mo. 2003). This Court has also identified several *improper* uses of a *nunc pro tunc* order. For example, a circuit court *cannot* use *nunc pro tunc* powers to: (1) enter a new judgment; (2) alter or amend a rendered judgment; (3) make a substantive change; or (4) correct anything that resulted from the exercise of judicial discretion. *Pirtle*, 956 S.W.2d at 242-43. There is simply no part of the *nunc pro tunc* powers that permits the correction of *judicial* omissions.

Third, Plaintiffs' interpretation of Rule 74.06(a) would swallow Rule 74.06(b), which permits a court to relieve a party from a *judicial* "mistake" and "inadvertence."

Plaintiffs offer no argument—and certainly no authority—explaining how Rule 74.06(a), and its allegedly infinite jurisdiction to correct judicial "omissions," can coexist with the much more limited authority to correct "mistakes" and "inadvertence" in Rule 74.06(b), which must be raised "not more than one year after the judgment or order was entered." Rule 74.06(c).[1]

Finally, Plaintiffs' interpretation is untenable in light of the Missouri public policy that favors protecting the finality of judgments.

> It simply is not a good idea to allow a judge unlimited liberty to go around changing the terms of judgments when the judge concludes that the judgment is erroneous. Because of our public policy of protecting the stability of judgments, the party seeking to uphold the change must rebut the presumption. If the presumption that the original judgment did not have a clerical error is not rebutted, then any order that changes the way the judgment is expressed is presumed to be unauthorized.

Dobson, 973 S.W.2d at 922.

In the end, there is no language in Rule 74.06(a) or the cases applying it that would have permitted the circuit court to correct its *judicial* omission in failing to apply an allegedly mandatory statute. *See City of Ferguson v. Nelson*, 438 S.W.2d 249, 255 (Mo. 1969) (the failure to apply an allegedly mandatory statue was "mere

[1] Plaintiffs moved for interest on October 2, 2012, which is more than a year after the May 10, 2011 judgment was entered. *See* Rule 74.06(c).

error, which is not to be corrected by *nunc pro tunc* proceedings"). As a result, the alleged *nunc pro tunc* rulings below must be vacated.

III. The standard of review for *nunc pro tunc* orders is jurisdictionally limited to a "supervisory" review of the record.

As part of Plaintiffs' efforts to expand *nunc pro tunc* jurisdiction, they claim that the standard of review is both broad and unclear. *See* Brief of Respondents at 15. However, Plaintiffs cite no authority to oppose Synergy's position that this Court is limited to a "supervisory" review conducted within the narrow confines of *nunc pro tunc* jurisdiction. *See Bureaus Inv. Grp. v. Williams*, 310 S.W.3d 297, 300 (Mo. Ct. App. 2010) (citing *In re Estate of Shaw,* 256 S.W.3d 72, 73 (Mo. 2008)).

Again, the power of *nunc pro tunc* is nothing more than a "court's power *over its records*"; this power "exists so that the court can cause its records to represent accurately *what occurred previously*." *Pirtle*, 956 S.W.2d at 240 (emphasis added). Consistent with *Pirtle* and settled Missouri law, an appellate court reviewing a challenge to a *nunc pro tunc* ruling merely reviews whether the challenged modification is supported by a *prior record* that had been made while the lower court had jurisdiction to act.

For example, this Court in *Pirtle* affirmed the correction of a typographical error that had labeled the wife as "Petitioner" rather than "Respondent" because "[t]he record … clearly establishes that the petitioner was Husband." *Id.* at 243. In comparison, in *City of Ferguson*, 438 S.W.2d at 255, this Court reversed a judgment that was amended to impose a sentence of imprisonment after finding "nothing in this

record to show that the trial court actually rendered any judgment and sentence of imprisonment[.]" Similarly, in *Loring v. Groomer*, 19 S.W. 950, 951 (Mo. 1892), this Court affirmed a *nunc pro tunc* amendment of a land description because the basis for the amendment was discernible from documents in the court's prior record. *See also Hyde v. Curling*, 10 Mo. 359, 363 (1847) (reversing a *nunc pro tunc* judgment entered in a subsequent term because there was no record from a previous term to support the revision).[2]

Like this Court's decisions, the court of appeals cases cited by Plaintiffs in their standard of review section all turn on whether a prior record supported the subsequent *nunc pro tunc* correction. For example, in *Pfeifer*, 788 S.W.2d at 781, the court vacated a *nunc pro tunc* order after finding there were "no docket entries, judge's minutes, or any other paper in the record [that would support the] Nunc Pro Tunc Order." The result in *McMilian*, 215 S.W.3d at 315-16, was the same—the court of appeals reversed a *nunc pro tunc* order declaring a marriage dissolved because review of the record showed no evidence that the circuit court had actually dissolved the marriage in its prior proceedings. Likewise, *Warren v. Drake*, 570 S.W.2d 803,

[2] The only potential "outlier" in the "standard of review" decisions cited by Plaintiffs is *Soehlke v. Soehlke*, 398 S.W.3d 10, 22 (Mo. 2013), which rejected a challenge to a *nunc pro tunc* modification because the modification was not the result of a *nunc pro tunc* order, but rather a Rule 75.01 amendment that was made while the circuit court still had jurisdiction.

807 (Mo. Ct. App. 1978), reversed a *nunc pro tunc* order because "the record in this case was wholly bereft of any competent evidence upon which to predicate the *nunc pro tunc* order drastically changing the original judgment rendered in this case." *See also Abbott v. Seamon*, 217 S.W.2d 580, 586 (Mo. Ct. App. 1949) ("[A *nunc pro tunc* order] must be made upon evidence furnished by the papers and files in the cause, or something of record, or in the clerk's minute book, or on the judge's docket.").

The remaining "sentinel" cases cited by Plaintiffs all hold that a *nunc pro tunc* order *was proper* because the clerical correction was supported by the court's previous record. Specifically, *Lockett v. Musterman*, 854 S.W.2d 831, 834 (Mo. Ct. App. 1993), held it was proper to amend a divorce decree *nunc pro tunc* to insert the legal description of the marital property because "the legal description merely served to further describe *what was already in the record*" (emphasis added). Likewise, *Gordon v. Gordon*, 390 S.W.2d 583, 587 (Mo. Ct. App. 1965) held that a judge's failure to sign a memorandum was a clerical error that could be amended via a *nunc pro tunc* order because it was "obvious" the amendment was supported by a record previously made (*e.g.*, entries in the judge's docket book).

The decisions discussed above *uniformly* hold that a *nunc pro tunc* amendment of a judgment is proper only if a *clerical* mistake in the *recording* of the judgment is discernable from a record made *before* a rendered judgment becomes final. In short, this Court's role in this appeal is to exercise its supervisory powers, review the record below, and determine whether there existed, *prior to the judgment becoming final*, some record in the case that would show the circuit court's intent to award Plaintiffs

post-judgment interest. There is nothing "unclear" about this standard of review. Instead, and as noted in beginning of this Reply Brief, Plaintiffs have no record to support the challenged modification, which means the ruling below must be vacated.

IV. Plaintiffs are improperly conflating the "intended Federal Funds rate" and the federal funds effective rate.

As previously argued by Synergy, the post-judgment interest rate for tort actions is based on "the intended Federal Funds Rate" for the date a judgment is entered *See* RSMo § 408.040. Again, the *intended* federal funds rate has been a *range* of 0 to 0.25 percent since December 16, 2008. Significantly, the plain language of section 408.040 contains no reference to the "effective" federal funds rate relied on by Plaintiffs, applied by the circuit court, and adopted by the court of appeals in its now vacated opinion. Although Plaintiffs dismiss Synergy's reading of this section as "unworthy of serious consideration" and "frivolous," they cite no authority that would permit a court or clerk, using the powers of *nunc pro tunc*, to re-write or interpret a statute. And without a significant revision of section 408.040, Plaintiffs' argument about post-judgment interest being "automatic" and "easily discernable" falls on its face.

First, when the General Assembly amended section 408.040 in 2005, it could not have foreseen that the "intended federal funds" would one day be a range of rates. In fact, at the time section 408.040 was amended, the intended federal funds rate was

a specific rate. For example, on September 20, 2005, the rate was 3.50 percent.[3] Although Plaintiffs want this Court to believe that the "effective" and "intended" rate are the same, a review of the "historical document" referenced by Plaintiffs (Brief of Respondents at 51), reveals that the "effective federal funds rate" on September 20, 2005 was *3.67 percent—not 3.50 percent*. Plainly, the effective funds rate and the intended federal funds rate are not the same.

The core issue, then, is how a circuit court should handle the application of interest rates when the intended funds rate is a range. At least one Missouri court has simply applied the higher end of the "range" by holding that "the intended Federal Funds Rate was .25 percent on January 26, 2011." *See Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co.*, 358 S.W.3d 528, 535 (Mo. Ct. App. 2012). However, Plaintiffs' "historical document" reveals that the "effective" rate on January 26, 2011 was .17 percent[4] and not .25 percent, as found by the court of appeals. This further cements that the "intended federal funds rate" and the "effective" rate are not the same. The court in *Good Hope* also relied on both the Federal Reserve Board's website[5] and a private sector website (Bankrate.com) in order to reject the bottom end (0 percent) of the range for the "intended federal fund

[3] http://www.federalreserve.gov/monetarypolicy/openmarket.htm

[4] http://www.federalreserve.gov/releases/h15/data.htm

[5] http://www.federalreserve. gov/monetarypolicy/openmarket.htm

rate."[6] In the end, Synergy's discussion about federal interest rates and webpages is only offered to show that applying section 408.040 is *not* automatic, *not* "readily discernable," and can result in *disagreement* about the applicable interest rate on a given day. Accordingly, determining the applicable interest rate should not be a clerical task, but rather a judicial task, which should be based on evidence or testimony received during a time when the court has jurisdiction to act.

Finally, Plaintiffs argue that the circuit court was permitted to take judicial notice of the applicable interest rate. Although Plaintiffs cite authority allowing a court to take judicial notice of *rules and regulations* promulgated pursuant to federal statutes (Brief of Respondents at 50), they cite no authority permitting a court to take judicial notice of a *webpage.* Nevertheless, a *judge's* decision to accept or refuse data from a webpage is based on the doctrine of *judicial* notice, which "must be tempered by *judicial* discretion." *See State v. Kelly*, 539 S.W.2d 106, 110 (Mo. 1976) (emphasis added). Again, the powers of *nunc pro tunc* cannot "correct anything that resulted from the exercise of judicial discretion." *Pirtle*, 956 S.W.2d at 243.

V. Synergy's counsel never agreed that post-judgment interest should be applied to the judgment.

Plaintiffs' argument relies heavily on an alleged "agreement" about the

[6] The Bankrate.com website, when visited on April 2, 2014, described the .25 percent rate as "Prime rate, fed funds, COFI" rate and not the intended federal funds rate. *See* http://www.bankrate.com/rates/interest-rates/federal-funds-rate.aspx.

applicable interest rate. *See, e.g.* Brief of Respondents at 13, 30, 51. However, Synergy's counsel has at *all times* opposed Plaintiffs' request for post-judgment interest. *See* LF:104-110. Plus, during the hearing on Plaintiffs' *nunc pro tunc* motion, Synergy's counsel only agreed that "*had* the Court ordered interest at the time that the judgment was made final, then the applicable interest rate *would have been* 5.09 [percent.]" TR:8:11-14 (emphasis added). During the same hearing, Synergy's counsel also explicitly opposed the request for a *nunc pro tunc* amendment to award Plaintiffs interest. TR:17:5-18.

It is revealing that Plaintiffs place so much emphasis on an alleged agreement about interest rates, especially after arguing that the application of section 408.040 is "automatic" and "ministerial." In other words, if section 408.040 is "automatic," then why did Plaintiffs seek an "agreement" about an appropriate interest rate? In any event, Plaintiffs' reliance on a stipulation is misplaced because a stipulation cannot be used to confer jurisdiction on the circuit court. *See, e.g., Groh v. Groh*, 910 S.W.2d 747, 749 (Mo. Ct. App. 1995).[7]

[7] A stipulation would have been relevant for *nunc pro tunc* purposes only if the parties had, on the record, agreed on the application of interest and the appropriate rate *before* the judgment below became final. *See Unterreiner v. Estate of Unterreiner*, 899 S.W.2d 596, 599 (Mo. Ct. App. 1995) (cited by Plaintiffs).

VI. The circuit court's December 31, 2012 "Judgment" is a nullity.

Plaintiffs further suggest that Synergy's challenge to the circuit court's award of interest is disingenuous because Synergy allegedly sought its own *nunc pro tunc* entry from the circuit court. Brief of Respondents at 53 (claiming that Synergy "invited" an error or has "unclean hands"). In response, Synergy provides the Court with the background of this dispute, which reveals, if anything, that Synergy was merely ensuring compliance with Rule 74.01(a).

After Synergy timely appealed the circuit court's November 7, 2012, *nunc pro tunc* order, the court of appeals sent a December 17, 2012 letter[8] stating that the "notice of appeal … indicates the absence of a final, appealable judgment." The court of appeals also requested that Synergy file "suggestions as to why this appeal should not be dismissed [.]" Synergy responded with its Suggestions in Support of Appellate Jurisdiction. *See* LF:132.

As previously argued in the court of appeals, Synergy had a statutory right to appeal from "*any special order after final judgment in the cause* [.]" RSMo § 512.020(5) (emphasis added). A *nunc pro tunc* order is a "special order after final judgment" appealable under this section (or its predecessors). *See, e.g.*, *Earhart v. A. O. Thompson Lumber Co.*, 140 S.W.2d 750, 754 (Mo. Ct. App. 1940); *State v. Woerner*, 294 S.W. 423, 425-26 (Mo. Ct. App. 1927); 24 MO. PRAC., APPELLATE

[8] This document was not included in the legal file, but is available on Case.Net on the court of appeals docket sheet (WD75783).

PRACTICE § 4.7 (2d ed.) (an appealable "special order" includes "[a]n order ruling on a motion to correct clerical error pursuant to Supreme Court Rule 74.06(a), provided, however, that such an appeal is limited to determining whether the order itself was proper[.]").

The court of appeals' letter indicated that it believed that Rule 74.01(a) required the challenged *nunc pro tunc* order to be denominated a "Judgment." However, such a requirement appears to conflict with Missouri law defining a proper *nunc pro tunc* order. On one hand, this Court held in *Brooks v. Brooks*, 98 S.W.3d 530, 531 (Mo. 2003), that a special *order* after final judgment must be denominated a "judgment" to be appealable. On the other hand, this Court has held that a proper *nunc pro tunc* order is merely a clerical correction that *relates back to a final judgment*, and is therefore neither a "new judgment" nor an "amended judgment." *Pirtle*, 956 S.W.2d at 241; *see also Baker v. Baker*, 90 S.W.3d 488, 490 (Mo. Ct. App. 2002) (*nunc pro tunc* ruling "cannot be used to create a judgment.").

Thus, the court of appeals seemed to believe that for a *nunc pro tunc* ruling to be appealable, a circuit court must engage in the fiction of denominating its *nunc pro tunc* order a "judgment" even though such an order can never be a judgment. Absent participation in this fiction, a circuit court could potentially engage in a series of judgment modifications, under the guise of *nunc pro tunc*, and thereby avoid appellate review. Moreover, a review of such orders by writ could also be improper because of the available remedy of an appeal from a special order entered after final judgment. *See State ex rel. Westmoreland v. O'Bannon*, 87 S.W.3d 31, 32 (Mo. Ct. App. 2002)

(quashing writ of prohibition because order issued after final judgment was appealable). Complying with these rules may be an unintended "Catch 22." The solution, however, appears to be the supervisory jurisdiction discussed in *In re Estate of Shaw*, 256 S.W.3d at 77.

In an attempt to comply with these conflicting requirements, Synergy invited the circuit court to amend its November 7, 2012 "Nunc Pro Tunc Journal Entry" so that it included "Judgment" in its title. In doing so, Synergy merely followed the Western District's instructions in *Kearns v. New York Cmty. Bank*, 389 S.W.3d 294 (Mo. Ct. App. 2013), that when a denomination issue under Rule 74.01 arises, "the practice encouraged by this opinion is to create a new document tracking the substantive language of the original 'order,' denominate it as a 'judgment,' and the trial judge should affix her signature." *Id*. at 294, n.4.

In full compliance with *Kearns*, the only difference between the November 7, 2012 "Nunc Pro Tunc Journal Entry" and the December 31, 2012 "Nunc Pro Tunc Journal Entry and Judgment," other than the date, is that the latter contains the words "and Judgment" in its title. *Compare* LF:126-128 *with* LF:129-130. Thus, Synergy, to avoid a potential dismissal of its appeal, followed the Western District's approved procedure for satisfying any concerns it may have had about Rule 74.01 compliance.

In short, Synergy invited the circuit court to engage in the apparently-necessary fiction of denominating its *nunc pro tunc* order a "judgment" even though such an order cannot, as a matter of law, be a judgment. Only as a precaution to ensure compliance with Rule 74.01 did Synergy invite the circuit court to follow a void

"Nunc Pro Tunc Journal Entry" with an equally void "Nunc Pro Tunc Journal Entry and Judgment." This is why Synergy's Point I asks this Court to vacate *both* the "November 7, 2012 and December 31, 2012 *nunc pro tunc* orders."

VII. Plaintiffs severely misread Rule 78.07(c).

As previously argued by Synergy, Rule 78.07(c) requires a party to timely file a motion to amend the judgment in order to challenge, on appeal, a circuit court's failure "to make statutorily required findings." Plaintiffs, who claim to be proponents of applying the plain language of this Court's rules, argue that Rule 78.07 is strictly limited to motions for a new trial in jury-tried cases. *See* Brief of Respondents at 44. However, Rule 78.07 applies to "after-trial motions," not just motions for a new trial. In addition, Rule 78.07(c) instructs that any "motion to amend the judgment" must be timely filed in "all cases"—not just jury-tried cases.

Plaintiffs are correct that the Rule 78.07 is concerned with preserving issues for appellate review. However, an appeal is always *optional*. If no party in this case had appealed or filed any post-trial motions, the judgment below would have been final and enforceable 30 days after its entry. *See* Rule 75.01. Plaintiffs obviously did not appeal the alleged errors in the May 10, 2011 judgment, but did seek to correct those errors more than a year later. Amazingly, Plaintiffs claim they were not "aggrieved by the judgment" even though it failed to award them roughly $77,000 per year in interest, and even though they sought (and obtained) an amended judgment. *See* Brief of Respondents at 44. It is also revealing that Plaintiffs claim the error in the judgment was "obvious" then admit they "noted the omission [of interest] only

much later" when Synergy rightfully refused to pay Plaintiffs any sum beyond that awarded in the judgment. *See* Brief of Respondents at 33, 44. Synergy is neither a "gingerbread man" nor attempting to play games of "gotcha." Instead, it merely recognizes that in an *adversarial* judicial system, it had no obligation to alert Plaintiffs of their failure to request interest, or pay to Plaintiffs anything more than what they requested and were awarded in the May 10, 2011 judgment.

The *fair and just* result in this appeal is that this Court should *not* reward Plaintiffs' disregard of Rule 78.07(c), their lack of diligence in reviewing the terms of a judgment, and their failure to appeal an alleged error in that judgment. Plaintiffs do not deserve a second bite at the apple via the powers of *nunc pro tunc*.

VIII. Plaintiffs' position would erode the separation of powers between the legislative and judicial branch.

As a final point, this Court should be concerned about Plaintiffs' suggestion that the General Assembly can render Missouri courts mere scriveners of legislative policy by enacting "mandatory" statutes that prescribe the form or language of judgments. While it is the General Assembly's function to declare the rights of citizens generally, only the judicial branch my "decide issues and pronounce and enforce judgments" in private disputes. *See Chastain v. Chastain*, 932 S.W.2d 396, 399 (Mo. 1996); *see also* Mo. Const. Art. II, § 1. Moreover, "neither the courts nor the legislature owns the concept of subject matter jurisdiction." *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254-55 (Mo. 2009) (defining subject matter jurisdiction as "the court's authority to render a judgment in a particular category of case.").

This Court clearly has authority to define the point at which a circuit court's jurisdiction to render a judgment ends. *See, e.g.* Rule 75.01. However, Plaintiffs interpretation of Rule 74.06(a) opens the door to legislative interference with the form or language of judgments already rendered. While statutes often define certain aspcets of a judgment, such as the remedies, the required findings of a child custody determination, and the rate of interest, a circuit court's failure to properly apply such statutes is merely error, which can be reviewed and corrected on appeal. The flaw with Plaintiffs' argument is that they would permit the legislature to have infinite control over the rights of parties by *requiring* amendments to a judgment, long after the parties' rights have been determined in a judgment rendered by the judicial branch.

CONCLUSION

Appellants Kenoma, LLC and Synergy, LLC request that this Court vacate the circuit court's amended judgment awarding Plaintiffs post-judgment interest.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft® Word), the brief, excluding those portions as defined by Rule 84.06(b) contains 5,555 words.

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 2, 2014, a copy of the foregoing Substitute Reply Brief of Appellants, together with the Certificate of Compliance, was served via the Court's electronic filing system on the counsel of record below who have registered with Missouri's electronic filing system:

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